No. 78-1187

IN THE

SUPREME COURT OF THE UNITED STATES

VIRGIL P. MILLER, *Petitioner*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent*

Respondent's Reply to Petition for Writ of Certiorari

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LIST OF AUTHORITIES

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes The Atchison, Topeka and Santa Fe Railway Company, Respondent in the above entitled and numbered cause, hereinafter called Respondent, and files this its reply to the Petition For Writ Of Certiorari of Virgil P. Miller, hereinafter called Petitioner, and for such reply would respectfully show the Court the following:

QUESTION PRESENTED

The sole issue in this case is whether the global issue of "safe place to work" must be submitted to the jury in every Federal Employers Liability Act case irrespective of the other issues of negligence submitted to the jury.

JURISDICTION

Respondent denies that this Court has jurisdiction to review the final judgment of the Supreme Court of Texas in this case. The only issue presented to the Supreme Court of Texas was whether the state trial court erred in refusing to submit to the jury the safe place to work issues requested by Petitioner and this certainly does not raise a question of any "title, right, privilege or immunity" under any statutes or the Constitution of the United States. See *Daulton v. Southern Pacific Co.*, 352 U.S. 1005, 1 L.Ed.2d 549, 77 S.Ct. 564; *Burch v. Reading Co.*, 353 U.S. 965, 1 L.Ed.2d 914, 77 S.Ct. 1049; *Brinkley v. Pennsylvania R. Co.*, 358 U.S. 865, 3 L.Ed.2d 97, 79 S.Ct. 94; *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 62 L.Ed. 385, 38 S.Ct. 140 and *Black v. Cutter Laboratories*, 351 U.S. 292, 100 L.Ed. 1188, 76 S.Ct. 824.

In addition, this Court by Rule 19, Supreme Court Rules, has stated that a review on writ of certiorari is not a matter of right and will be granted only where there are special and important reasons therefor. The method of the trial court's submission of negligence certainly does not fit into that category. Furthermore, this identical issue has been decided by this Court in *Robinson v. G.C. & S.F. Ry. Co.*, 325 S.W.2d 432 (Tex. Civ.App.—Fort Worth 1959, wr.ref'd), cert. denied 362 U.S. 919, 4 L.Ed.2d 739, 80 S.Ct. 672 and Petitioner has failed to cite a single case which is in conflict with the holding in that case.

STATEMENT OF THE CASE

This is a simple case brought by the Petitioner under the Federal Employers Liability Act in which Petitioner claimed that he had been injured while nipping (raising) crossties with a lining bar so that ballast could be placed under the crossties. It was the contention of Petitioner that he had been furnished a lining bar rather than a claw bar (which had a bent end) to nip ties, that he had not been instructed as to the use of a lining bar for this purpose and that as a result he stuck the lining bar through the bottom of a crosstie into the ground causing an injury when he tried to remove the lining bar. In support of this position, Petitioner called two experts to testify and both of those experts testified that a claw bar rather than a lining bar should be used for the job that Plaintiff was performing.

It is obvious that the trial court listened very carefully to the evidence presented because those are exactly the issues submitted by the trial court to the jury as follows:

> "Special Issue No. 1:
>
> "Do you find from a preponderance of the evidence that the defendant:
>
> "(a) On the occasion in question failed to exercise ordinary care to make available a claw bar for plaintiff's use in nipping the crosstie?
>
> Answer: We do not.
>
> "(b) Prior to or on the occasion in question failed to exercise ordinary care to instruct

the plaintiff in the proper use of a lining bar?

Answer: We do not."

By the testimony of Petitioner himself, these acts were the only cause of the accident. In fact, Petitioner filled out an accident report in which he stated that there was no defect in the place where he was working which caused the accident.

ARGUMENT AND AUTHORITIES

Petitioner is apparently confused by the distinction between the duty owed by a railroad to its employees and the method of submission to the jury of a violation of that duty. Undoubtedly, a railroad or any other employer has a duty to furnish to its employees a reasonably safe place to work. However, under Texas procedure, the method of submitting to the jury the question of whether this duty has been violated is by special issue and Rule 279, Texas Rules of Civil Procedure, specifically provides the following:

> "Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue."

The trial court in this case submitted the only issues of negligence raised by the evidence against Respondent and the jury found against Petitioner on those issues.

Petitioner now contends that the trial court erred in

refusing to submit the general safe place to work issues requested by Petitioner. Petitioner cites no case which holds that it is error and ignores the only Texas case to our knowledge which has decided this issue. This issue was decided in the case of *Robinson v. G.C. & S.F. Ry. Co., supra.* In the *Robinson* case, the plaintiff alleged many specific acts of negligence on the part of the railroad company, together with the general allegation of safe place to work. The trial court submitted numerous special issues relating to each specific act of negligence which had been plead by the plaintiff and on which some evidence had been produced. The trial court refused to submit the general issue of safe place to work. The jury answered each of the special issues adversely to plaintiff and the trial court entered judgment for the defendant railroad. On appeal, the Fort Worth Court of Civil Appeals identified the precise question of the case as being "whether the trial court adequately presented plaintiff's case to the jury." (325 S.W.2d at 435). The court held that, since the specific issues submitted did include all the grounds on which a finding of unsafe place to work could be based, there was no error in refusing to submit the requested issue, using the following language:

> "We do not intend to hold, and do not hold, that it is improper in a F.E.L.A. case to submit a general issue on unsafe place to work and special issues on specific acts or omissions. We merely hold, under the whole record in the case before us, that the trial court did not deprive plaintiff of any substantive right by refusing to submit the general issue of unsafe place to work, having concluded that the special issues properly and

adequately presented all plaintiff's grounds on which there was evidence of unsafe place to work to the jury."

In the *Robinson* case, the Supreme Court of Texas also refused an application for writ of error. Also, a petition for writ of certiorari was filed in this Court and was denied at 4 L.Ed.2d 739. If this Court will examine the petition for writ of certiorari filed in this Court in the *Robinson* case, the Court will find that the identical issue was presented and by denying the petition for writ of certiorari, this Court held that the general issue of safe place to work does not need to be submitted to the jury where the special issues submitted do properly and adequately present all of the plaintiff's grounds on which there was evidence of unsafe place to work.

In order for this Court to determine whether or not the trial court adequately presented Petitioner's case to the jury, it would be necessary for the Court to examine the Statement of Facts but it cannot do so since Petitioner has failed to bring forth the record to this Court. However, we should point out that three courts, the trial court, Fort Worth Court of Civil Appeals and the Supreme Court of Texas, have examined such record and have concluded that the special issues submitted by the trial court to the jury did properly and adequately present all of Petitioner's grounds on which there was evidence of unsafe place to work to the jury.

Petitioner in his Petition For Writ Of Certiorari in this Court seems to take the position that additional

issues of negligence were raised by proof that Petitioner was required to work around mud and a deteriorated crosstie. No witness, including the Petitioner, testified that the Respondent was negligent in having Petitioner work around mud or a deteriorated crosstie or that the mud or deteriorated crosstie caused the accident in question. These conditions were mentioned by Petitioner only in connection with his contention that the lining bar wouldn't have gotten stuck if he had been furnished with a claw bar rather than a lining bar. Certainly there was no evidence that Respondent was negligent in having Petitioner work when the ground was wet or around crossties which could be pierced when struck by a heavy steel bar. Even the experts of Petitioner made no such contention and they would have been laughed out of court by the jury if they had done so. A fair reading of the Statement of Facts shows that the only issues of negligence were that of furnishing a lining bar rather than a claw bar and in failing to properly instruct Petitioner on the use of the lining bar. Evidence was submitted by Petitioner on these issues and these issues were submitted to the jury but found adversely to Petitioner. The submission of the global issue of safe place to work would have permitted the jury to speculate about matters on which there were no pleadings or evidence and any favorable finding to Petitioner clearly would have been without any support in the evidence.

None of the cases cited by Petitioner are in point as none hold that it is error for a trial court to refuse

to submit to the jury the issue of safe place to work where issues of specific acts of negligence have been fairly submitted to the jury. All of the cases cited by Petitioner on pp. 11 through 17 of his Petition For Writ Of Certiorari involve cases where the court determined the standard of proof necessary to support a finding of negligence by the jury. In each of such cases, a finding of negligence by the jury had been set aside by the court so that the only issue was how much evidence was sufficient to support a finding of negligence by the jury.

One other contention of Petitioner needs to be discussed and that is the statement on p. 18 to the effect that the state court in this case has narrowed the concept of proximate cause under the Federal Employers Liability Act. This argument makes no sense at all as none of the Texas courts have concluded that Respondent was free of negligence or that its negligence was not the cause of Petitioner's injuries. The jury rather than the courts decided that Respondent was free of negligence. Of course, the jury did not reach the causation issues with regard to the negligence of Respondent since they failed to find any negligence, but such issue was as follows:

"Special Issue No. 2:

"Do you find from a preponderance of the evidence that such act or omission of the defendant was a cause, in whole or in part, of the injuries, if any, sustained by the plaintiff on the occasion in question with respect to:

"(a) Failure to exercise ordinary care to make

available a claw bar for plaintiff's use?

Answer: .....

"(b) Failure to exercise ordinary care to instruct plaintiff in the proper use of a lining bar?

Answer: ....."

The trial court submitted to the jury the causation issue in the traditional manner following the mandate of this Court in *Rogers v. Missouri-Pacific RR. Co.*, 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443.

CONCLUSION

Petitioner's repeated statements that he was deprived of a jury trial are not true. This is not an instance where the trial court took the case from the jury or where a verdict was overturned on appeal. The trial court submitted all issues supported by the pleadings and the evidence to the jury and the jury resolved the essential negligence issue against the Petitioner. Petitioner has clearly had his jury trial and he has not been denied any substantive right.

There is no way to construe the opinions of this Court in the last several years other than as saying and holding that the jury verdict in F.E.L.A. cases must be accorded finality. For instance, see *Wilkerson v. McCarthy*, 336 U.S. 53, 93 L.Ed. 497, 69 S.Ct. 413. This Court also has said many times that the finality of a jury verdict in an F.E.L.A. case should not be disturbed for unsubstantial errors in procedure. *Rogers v. Missouri-Pacific RR. Co., supra*, and *Webb*

v. Illinois Central RR. Co., 352 U.S. 512, 1 L.Ed.2d 503, 77 S.Ct. 451.

The only thing unusual about this case is that a railroad won a F.E.L.A. case before a jury and surely this is not grounds for reversal. Certainly if the jury verdict had been for the Petitioner in this case and the Respondent had presented the same error, or the same type of error, seeking a reversal and a new trial, this Court would certainly not even consider a petition for writ of certiorari on such grounds.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Respondent's Reply to Petition for Writ of Certiorari has been mailed on the 26th day of February, 1979, to Lowell E. Dushman, Dushman, Greenspan, Friedman & Gray, 920 Commerce Building, Fort Worth, Texas 76102, attorneys for Petitioner.

Luther Hudson